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# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1987**

GENERAL DYNAMICS LAND SYSTEMS, INC.,
*Petitioner,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200,
*Respondents.*

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GENERAL DYNAMICS LAND SYSTEMS, INC.,
*Petitioner,*

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH COMMISSION,
*Respondents.*

## PETITIONER'S REPLY BRIEF

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12 pp

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| ARGUMENT | 2 |
| I. THE COURT OF APPEALS STRUCK DOWN THE SECRETARY OF LABOR'S REGULATION 1910.5(f) | 2 |
| II. NO PARTY DENIES THE CLEAR LEGISLATIVE HISTORY DEMONSTRATING THAT THE GENERAL DUTY CLAUSE WAS INTENDED BY CONGRESS TO BE PREEMPTED WHERE A SPECIFIC STANDARD COVERED THE RISK IN QUESTION. | 4 |
| III. THE FREON STANDARD, 29 C.F.R. § 1910.1000(a)-(d), (e), COVERS THE RISK TO THE FULL EXTENT CONTEMPLATED BY REGULATION 1910.5(f) | 6 |
| CONCLUSION | 9 |

## TABLE OF AUTHORITIES


**Cases:** Page

*Brock v. L.R. Willson and Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985) ..... 6, 7

*Con Agra, Inc., McMillan Company Division*, 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141 8

*Donovan v. A.A. Beiro Construction Co.*, 746 F.2d 894 (D.C. Cir. 1984) ..... 7-8

*Donovan v. Castle and Cooke Foods*, 692 F.2d 641 (9th Cir. 1982) ..... 8

*Todd's Shipyards Corp.*, 81 O.S.H.A.R.C. 69/A2, 9 B.N.A. O.S.H.C. 2031, 1981 C.C.H. O.S.H.D. ¶ 25,516 at p. 31,812 (Rev. Comm. 1981) ..... 7

*Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980) ..... 4, 5

**United States Statutes and Regulations:**

29 U.S.C. § 654(a)(1) ..... 2

29 C.F.R. § 1910.5(f) ..... passim

29 C.F.R. § 1910.1000(a)-(d), (e) ..... 6, 7, 8

**Other Authorities:**

*U.S. Code Congressional and Administrative News*, 91st Congress, Second Session (1970), p. 5186 (S. Rep. 91-1282) ..... 4, 5

*H. R. Rep. No. 91-1765, 91st Congress, 2d Sess.*, 1970 .. 5

*BNA Daily Labor Report*, September 17, 1987 ..... 6

## INTRODUCTION

On August 17, 1987, Petitioner, General Dynamics Land Systems, Inc. ("General Dynamics"), filed its Petition for a Writ of Certiorari in this matter. On or about September 24, 1987, Respondents the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1200 (the "Union") filed their Brief in Opposition. On or about November 16, 1987, Respondent the United States Secretary of Labor (the "Secretary") filed his Brief in Opposition. General Dynamics submits this Reply Brief, pursuant to Supreme Court Rule 22.5, in response to arguments raised in Respondents' Briefs in Opposition.

## ARGUMENT

### I.

### THE COURT OF APPEALS STRUCK DOWN THE SECRETARY OF LABOR'S REGULATION 1910.5(f).

While the Union's Brief in Opposition, *see* pp. 7-9, acknowledges the Court of Appeals's invalidation of Regulation 1910.5(f), the Secretary claims that the court did no such thing. *See* Secretary's Brief in Opposition, p. 7. The Secretary is in error. There can be no sensible reading of the Court of Appeals's decision other than that the court has struck down Regulation 1910.5(f).

The Regulation states that an employer in compliance with a specific standard promulgated by the Secretary for a given risk "*shall be deemed* to be in compliance with the requirement of Section 5(a)(1) of the Act . . ." 29 C.F.R. § 1910.5(f) (emphasis added). The Court of Appeals, however, found that Regulation 1910.5(f) was inconsistent with Section 5(a)(1) of OSHA, 29 U.S.C. § 654(a)(1). *See* Appendix E, pp. 13-16. In place of Regulation 1910.5(f), the Court of Appeals created its own regulation to address circumstances in which an employer might otherwise be subject to both the general duty clause and a specific standard covering the risk in question. *See* Appendix E, pp. 15-16. The court's new regulation, based on its reading of the Act, is that preemption depends upon the employer's state of mind or "scienter." App. E, p. 15.

When the Court of Appeals found that "the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause. . . .," Appendix E, p. 13, it invalidated Regulation 1910.5(f). Although the court described the purported conflict it perceived between the Act and the Secretary's preemption Regulation, Section 1910.5(f), as "any apparent" conflict, *id.* at 14, this cannot alter the nature of the court's decision. That decision was to replace the Secretary of Labor's preemption regulation with the court's own regulation

and thereby strike down and invalidate a U.S. administrative agency's at least equally reasonable interpretation of the Act. *See* Petition, pp. 15-16.

In addition to the irony of the Secretary of Labor defending the Court of Appeals's invalidation of the Secretary's own OSHA interpretative Regulation, it is ironic that the court would note and that the Secretary would emphasize, in his Brief in Opposition, the fact that this case did not involve a "challenge . . . to any OSHA regulation, but rather a challenge to the Commission's interpretation of particular OSHA regulations." *See* court's Opinion, Appendix E, p. 10; Secretary's Brief in Opposition, p. 7. This is precisely what makes the Court of Appeals's decision so startling. While every single party and agency in this case, and apparently every decision ever considering a general duty clause preemption issue, has accepted the validity of Regulation 1910.5(f), *see* Petition, pp. 13-14, the court itself in this case *sua sponte* challenged the Secretary's Regulation, and then proceeded to strike down such Regulation and replace it with a regulation of the court's own devising. Petitioner is confident that upon examination of the Court of Appeals's decision, this Court will find, whatever its ultimate evaluation, if any, of the lower court's decision, that the lower court did indeed strike down and replace the Secretary's Regulation.

## II.

## NO PARTY DENIES THE CLEAR LEGISLATIVE HISTORY DEMONSTRATING THAT THE GENERAL DUTY CLAUSE WAS INTENDED BY CONGRESS TO BE PREEMPTED WHERE A SPECIFIC STANDARD COVERED THE RISK IN QUESTION.

General Dynamics wishes to emphasize that a certain argument is *missing* from the Secretary and Union Briefs in Opposition. Neither Brief makes any claim that the legislative history of OSHA indicates in any way that a rule even remotely approximating the Court of Appeals's new "scienter" rule was intended by Congress when it passed the Act. Rather, as set out by General Dynamics in its Petition, the legislative history is absolutely clear that the general duty clause was intended to be preempted where the Secretary had promulgated a specific standard to address the risk in question. *See* Petition, pp. 16-18. Thus, the Secretary's Regulation, 29 C.F.R. § 1910.5(f), interpreting the Act as "deeming" or conclusively presuming employer compliance with the general duty clause where the employer has complied with a specific standard covering the risk, is perfectly in accord with the legislative history of the Act.

This legislative history[1] is crucial because the Act is *not* clear. *See* Petitioner's Brief, pp. 14-16. While the Court of

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[1]The Secretary's Brief quotes a decision of this Court, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980), for the proposition that the general duty clause is "mandatory [and] independent of the specific health and safety standards promulgated by the Secretary." Secretary's Brief in Opp., p. 7 (bracketed material in quotation by Secretary). The decision in the *Whirlpool* case was that a regulation of the Secretary of Labor allowing an employee to choose not to perform an assigned task because of fear of injury was entitled to deference because such regulation could not "be said *not* to be a reasonable and supportable interpretation of the Act." 445 U.S. at 12-13 (emphasis added). Importantly, Senate Report No. 91-1282, a history of the Bill that became the final Act, which Senate Report was cited, *inter alia*, by this Court in *Whirlpool* regarding the legislative history of the general duty clause (the House version was not adopted), states explicitly:

> The general duty clause in this Bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to ensure the protection of employees who are working under *special circumstances for which no standard has yet been adopted*.

*(Footnote continued on next page)*

Appeals states that it finds the Statute "clear" and thus disregards the legislative history, Appendix E, p. 12, the court never explains how it reaches this conclusion. This is troublesome because nowhere in the Act is it stated that the general duty clause applies even if a specific standard has been promulgated to cover the risk in question. Doubtless the Act was not "clear" on this point to the *Secretary of Labor,* who promulgated Regulation 1910.5(f). Neither the Union's nor the Secretary's Brief comes to the aid of the Court of Appeals in this regard. The Secretary and the Union can provide no such aid because this position is unsupportable. *See* Petitioner's Brief, pp. 14-16. Thus, this Court should examine and rely upon the legislative history of the Act, which demonstrates conclusively that Congressional intent was precisely contrary to the decision of the Court of Appeals and precisely in accord with the Secretary's Regulation 1910.5(f).

*(Footnote continued from previous page)*

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Senate Report 91-1282, printed in *U.S. Code Congressional and Administrative News,* 91st Congress, Second Session (1970), p. 5186 (emphasis added) (cited in the same *Whirlpool* passage, *see* 445 U.S. at 12-13 and n.17). Thus, the very legislative history relied upon by this Court in its consideration of the general duty clause on a different issue overwhelmingly supports the interpretation of the Act set out in Regulation 1910.5(f), which Regulation was struck down here by the Court of Appeals. *See also* H.R. Rep. No. 91-1765, 91st Congress, 2d Sess., 1970, p. 22 (same statement of intent).

## III.

## THE FREON STANDARD, 29 C.F.R. § 1910.1000(a)-(d), (e), COVERS THE RISK TO THE FULL EXTENT CONTEMPLATED BY REGULATION 1910.5(f).

The Secretary's Brief in Opposition offers as a justification for the Court of Appeals's decision the claim that under Regulation 1910.5(f) the risk addressed in the Citation in this case, exposure to freon in an M-1 Tank, is distinct from the risk addressed by Regulation 1910.1000(a)-(e). See Secretary's Brief in Opposition, p. 8. Of course, in no case could this claim correct the court's action in *striking down* Regulation 1910.5(f). In any event, this claim by the Secretary is erroneous, as was determined by the Administrative Law Judge when he applied Regulation 1910.5(f) below.

With respect to the *quantity* of freon to which an employee may be exposed, the ALJ found that Section 1910.1000(a)'s 8 hour time weighted average limitation completely governed the risk of exposure. App. C, p. 12.[2] In addition, as the ALJ found and as was explicitly *conceded* by the Secretary in his Brief to the ALJ, *see* App. C, p. 12; quotation in Petition, p. 24, Section 1910.1000(e) already requires *qualitative* controls, e.g., *confined*

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[2]Unlike other substances covered by Regulation 1910.1000(a)-(d), e.g., carbon tetrachloride, the Secretary did not establish an even shorter term (such as five minute) elevated exposure "acceptable ceiling concentration" or still more elevated "acceptable maximum peak" for freon. *See* Section 1910.1000, Table Z-2, App. B, p. 20; *see also* Petition, p. 12 n.5. The Secretary did *not*, as in *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1982) (cited by Secretary at p. 8 n.4 of Brief in Opp.), leave the particular risk unregulated. Rather, the Secretary established for freon a degree and nature of quantitative regulation, ie., the less stringent eight hour time weighted average, that the Secretary *now* claims is inadequate. Thus, it was extremely sensible and fair for the ALJ to conclude that General Dynamics' full compliance with the eight hour time weighted average limit (undisputed here) was compliance with a regulation that covered the risk under Section 1910.5(f). If the Secretary feels that more stringent regulation of freon exposure risk is necessary, he may *modify* the freon standard and establish for freon, e.g., a maximum peak or an acceptable ceiling concentration — which he has recently tightened for benzene (a substance also covered by Regulation 1910.1000). *See* BNA Daily Labor Report, September 17, 1987, p. A-6.

*space entry procedures* if such a tank is a confined space, to address the alleged overexposure hazard present during construction of an M-1 Abrams Tank.[3] Simply stated, there is no control implementable to address the hazard alleged in this case not already required, if necessary to abate the hazard, under Section 1000(e). *See Todd's Shipyards Corp.*, 81 O.S.H.A.R.C. 69/A2, 9 B.N.A. O.S.H.C. 2031, 2034, 1981 C.C.H. O.S.H.D. ¶ 25,516 at p. 31,812 (Rev. Comm. 1981). Thus, the ALJ correctly found that the quantitative and qualitative requirements of the freon regulations "covered" the risk. *See* App. C, p. 12. As a result, Petitioner's undisputed compliance with Section 1910.1000(a)-(e) requires that Petitioner "shall be deemed to be in compliance with the requirements" of the general duty clause. 29 C.F.R. § 1910.5(f).

This Court should conclude that its general rule of deference to an administrative agency applies with respect to the Review Commission and Administrative Law Judge's application of Regulation 1910.5(f) to the present circumstances. Because the Court of Appeals found the language of the Statute "clear," it did not reach the issue of whether deference to the Commission or to the Secretary of Labor was appropriate where their interpretations of a Regulation under the Act differed. App. E, p. 12. For a description of the split of authority on this issue, *see Brock v. L.R. Willson and Sons, Inc.*, 773 F.2d 1377, 1383, n.7 (D.C. Cir. 1985). Interestingly, the only decision, of which General Dynamics is aware, addressing the issue of which entity, as between the Secretary of Labor and an Occupational Safety and Health Review Commission Administrative Law Judge, a reviewing court should defer to on an interpretation under OSHA or its Regulations is a decision of the District of Columbia Circuit Court of Appeals. In *Donovan v. A.A. Beiro Construction Co.*, 746

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[3]The Secretary's statement at page 2 of his Brief in Opposition that the standard does not set "any limits" for exposure in confined spaces ignores both the *mandatory* qualitative requirements of Section 1000(e) and the fact that Section 1000(a) requires that time weighted exposure not exceed 1000 parts per million *anywhere*. The Regulation makes no exception for alleged or actual confined spaces. *See* 29 C.F.R. § 1910.1000(a), (e).

F.2d 894, 903-905 (D.C. Cir. 1984), the D.C. Circuit deferred to the ALJ's interpretation of the Secretary's Regulation (which ALJ interpretation was made a Final Order, as here, by the Review Commission), the court finding that it could not "say the ALJ's interpretation of the Regulation [was] unreasonable." 746 F.2d at 905. Given the sensibility of deferring "to the Commission's expertise in exercising the *independent* adjudicatory [i.e., not prosecutorial] function assigned to it by the Act," *Donovan v. Castle and Cooke Foods,* 692 F.2d 641, 646 (9th Cir. 1982) (emphasis and bracketed material added), this Court should reach a similar conclusion, should it find it necessary, in this case.[4]

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[4]Petitioner relies upon its Petition for Certiorari with respect to remaining issues, in particular issues relating to the Review Commission's decision in *Con Agra, Inc., McMillan Company Division,* 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141. Petitioner would state its disagreement here, however, with the Secretary's statement that the Administrative Law Judge declined to rule on the issue of whether an M-1 Tank was a confined space. *See* Secretary's Brief in Opposition, p. 10. As set out in Petitioner's Petition, *see* pp. 26-29 and ALJ's decision, Appendix C, pp. 9, 11, 22, *Con Agra* was found by the ALJ to be inapplicable because of the M-1 Tank's natural and mechanical ventilation. *See also* Petition, pp. 26-29, with respect to other items regarding findings of ALJ on confined space issues. The Secretary's contentions notwithstanding, the ALJ merely declined to rule on the general duty clause citation generally and did not so decline with respect to the confined space issue. Appendix C, p. 9. Rather, for the purposes of distinguishing *Con Agra,* the ALJ found that an M-1 Tank is not a confined space requiring special entry procedures. *See* Appendix C, pp. 9, 11; Petition, pp. 26-27.

As an additional final note, given the factual emphasis of the Union and Secretary's Briefs in Opposition, General Dynamics wishes that the Court be apprised of record facts explaining the alleged physical reaction of the employee in question, Charles Paling, to freon on the day of the incident in question. While the Union and the Secretary emphasize Paling's physical symptoms, they fail to acknowledge Paling's own testimony that he had been taking prescription diet pills, which could well have caused his symptoms. *See* ALJ's decision, App. C, pp. 18-19. Certainly, as is not now disputed by the Secretary and Union, General Dynamics did not violate the freon exposure standards set out at 29 C.F.R. § 1000(a)-(e). *Id.*, pp. 21-22. Petitioner requests that the Court examine the ALJ's decision generally for many other credited record facts not included in the Secretary and Union briefs. *See* Appendix C.

## CONCLUSION

For the foregoing reasons, General Dynamics Requests that this Court grant its Petition for a Writ of Certiorari, reverse the decision of the United States Court of Appeals for the District of Columbia Circuit, and remand this matter to the Occupational Safety and Health Review Commission for dismissal as originally ordered by the Commission.

Respectfully submitted,

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